SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 456

REIES LOPEZ TIJERINA AND JERRY NOLL,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners, Reies Lopez Tijerina and Jerry Noll, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit which was entered against them on June 23, 1969.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Tenth Circuit has not yet been reported but a copy of the opinion is attached as Appendix A. A copy of the findings of fact and conclusions of law entered by the District Court is attached as Appendix B.

JURISDICTION.

The Court of Appeals entered its judgment on June 23, 1969. The Supreme Court of the United States on July 11, 1969, entered an Order Extending Time to File Petition for Writ of Certiorari to August 11, 1969. This Court has jurisdiction to review the judgment by a Writ of Certiorari under 28 U. S. C. § 1254 (1).

QUESTION PRESENTED.

What are the Constitutional limitations on a court's power to restrict a defendant from discussing his pending criminal proceeding in public and were they exceeded in this case?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.

1st Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

18 USC § 401; Power of court:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

STATEMENT OF THE CASE.

In October, 1967, Petitioners Tijerina and Noll, together with three other individuals, were defendants in a criminal proceeding then pending in the United States District Court for the District of New Mexico. Incident to that proceeding, the court, prior to trial, entered an order which was made applicable to the attorneys, witnesses and defendants in the case and which purported to proscribe extra-judicial statements concerning the case. The order, in pertinent part, provided:

> No party covered by this Order shall make or issue any public statement, written or oral, either at a public meeting or occasion or for public reporting or dissemination in any fashion regarding the jury or jurors in this case, prospective or selected, the merits of the case, the evidence actual or anticipated, the witnesses or ruling of the Court. (App. A14.)

Subsequently, on October 21 and 22, 1967, both Petitioners attended the national convention of an organization known as the Alianza Federal de los Pueblos Libres, which was held in Alburquerque, New Mexico on those dates. Petitioner Tijerina attended as president of the Alianza, Petitioner Noll as an invited guest. At the convention, both Petitioners made speeches during the course of which they each made statements found by the trial court to have been violative of its pretrial order. Upon application of the United States Attorney, Petitioners were adjudged guilty of contempt of court pursuant to 18 U. S. C. § 401(3). This decision was affirmed by the United States Court of Appeals for the Tenth Circuit.

The contempt conviction of Petitioner Tijerina is based on remarks made on each of the days of the convention. His remarks of October 21, spoken rapidly in Spanish were interpreted by a plainclothes police officer for the

benefit of a newspaper reporter who reported them "in substance" in the admitted hope that the U. S. Attorney would read his account and take appropriate action. (Transcript of Proceedings, 18-19, 26, 59-60, 84-85.) Petitioner Noll's comment and Tijerina's statement of October 22, were recorded surreptitiously by a plainclothes police officer (Tr. 94-96, 101-02, 106-07, 124-30, 132-34, 136-37). The officers and newspapermen who reported the Petitioners' comments were not invitees of the convention and their testimony expressed undisguised hostility toward the Petitioners.

The alleged statements of the Petitioners were:

(1) Noll:

> The U. S. is for sabotage and revolutionary terror and is practiced by its agents upon us, upon the black people and upon other people. The United States call us revolutionaries when in fact it is its agents that are the reactionary revolutionists sponsoring and advocating my over-throw by force and violence and other illegal means. Nothing is more evident about the intention of the U. S. than its recent conduct in regard to the events at the Echo Amphitheater, at Tierra Amarilla. Without even any kind of justification, without making any use of diplomatic relations, the U. S. sent police forces into my territorial jurisdiction to exercise an administrative act without my consent. The U. S. has declared with its usual arrogance that comes from the possession of stolen property, that I, Reies Lopez Tijerina, Christobal Tijerina, Esequiel Dominguez, Alfonso Chavez * * * are criminals and that it was going to try us and put us to death. I am willing to die for my country and for my people. That is part of my job as a king and all in a day's work. It's one of the job hazards and if my enemies manage to put me to death, I know that I will not die in vain for the moment which will lead to eventual liberation of my country and the unshackling of the chains for foreign bondage of my people will be carried forward

by my people and who are now beginning to shake off their slumber and know that they are despised and maltreated by their anglo friends and neighbors.

* * * * * *

War with the U. S. is imminent, for during the last week of August, I caused to be sent to the self-styled President of the United States of America, an ultimatum which he received August 31st. This ultimatum, in essence, declared that if and when the alleged cases in U. S. imposed force relative to the events at the Echo Amphitheater and Tierra Amarilla should commence for trial, a state of war should exist as of that date between the Kingdom of the Indies and the United States of America. According to the newspaper, the tentative date for the war to commence is November 6th, but I think they are going to try to postpone it. Therefore, prepare yourselves for war. I suggest that a scorched earth policy be used; for every nation that used this policy were victorious. We must burn every tree, every blade of grass, every building within the kingdom. Let them burn, burn, burn. (App., A16-17.)

(2) Tijerina—October 21:

U. S. District Judge Howard C. Bratton last week issued an order against any of the defendants, witnesses and lawyers not to talk about the case outside of the courtroom. If Judge Bratton asks me I'll tell him I told the witnesses what to say and what to do. I may get arrested. This is fine. It's all right with me because I don't want Judge Bratton to judge this case. (App., A15.)

October 22:

For example, the trial of Reies Tijerina is coming up and Reies Tijerina is going to be judged the 6th of November and that is an important issue. We know that the Judge has taken the power in his own hands. We know that the judge is using the law to take vengeance and drink blood and humiliate our race. In this case we can advise the Negro pueblo of what is going on and they can come out and march around the court house. This is their business. (App., A15-16.)

REASON FOR GRANTING THE WRIT.

The Decision of the Court of Appeals Involves Important Issues as to the First Amendment Limitations on the Power of a Federal District Court to Restrict Extrajudicial Statements by a Defendant Concerning His Pending Criminal Case and as to the Proper Interpretation of the Court's Decision in Sheppard v. Maxwell, 384 U. S. 333.

The short period of time which has elapsed since this Court's landmark decision in *Sheppard* v. *Maxwell,* 384 U. S. 333 (1966), has seen an unprecedented avalanche of legal literature, public discussion, debate and controversy concerning the problems inherent in striking a proper balance between the fundamental right of a defendant in a criminal proceeding to a fair trial before an impartial jury and the equally precious rights guaranteed by the first amendment, in the context of modern mass communications. The issues involved are of fundamental importance to our constitutional system of justice. The Court has been called upon with increasing frequency to preserve the impartiality of the judicial process in the face of massive publicity which threatened to render observance of the constitutional mandate impossible (*Sheppard* v. *Maxwell, supra; Estes* v. *Texas,* 381 U. S. 532 (1965); *Rideau* v. *Louisiana,* 373 U. S. 723 (1963); *Irvin* v. *Dowd,* 366 U. S. 717 (1961). In each of these cases a defendant's fifth and sixth amendment rights were threatened or wholly subverted by pervasive prejudicial pretrial publicity for which he was in no way responsible and which he was powerless to control. In each of these cases the failure of the trial court to adopt adequate measures to protect the defendant from the prejudicial effect of intense coverage in the media led to reversal. These cases clearly demonstrate that it is the trial court's duty, through effective use of its power to supervise the courtroom and

participants in the trial, to protect the defendant from "trial by newspaper".

The present case presents an aspect of the "fair trial-free press" problem which the Court has not had occasion to consider. The trial court, finding that a "reasonable likelihood" that prejudicial pretrial publicity would occur, entered an order proscribing extra-judicial statements concerning the case by participants in the trial, including the defendants themselves. These defendants have now been adjudged guilty of contempt for allegedly violating the very order which was purportedly entered for their own protection.

The only offense for which Petitioners have been convicted and sentenced to fine and imprisonment is the public utterance of words which they were allegedly forbidden to speak by a previous court order. Thus, that the order has a direct impact on speech requires no argument. The order by its terms prohibits "any public statement, written or oral" about designated matters. It thus raises grave constitutional issues. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 70 (1963). See *Near* v. *Minnesota*, 283 U. S. 697 (1931).

The possible conflict between free speech and fair trial thus raised by this case is an issue of the gravest moment. "For", as the Court pointed out in *Bridges* v. *California*, 314 U. S. 252, 260 (1941), "free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." Nevertheless, it went on to say, "[h]istory affords no support for the contention that the criteria applicable under the Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case" (*Id.*, at 268).

The decisions of this Court leave no doubt that the power of a court to punish for contempt comments made outside its presence is subject to the limitations of the first amendment, *Bridges* v. *California,* 314 U. S. 252 (1941); *Pennekamp* v. *Florida,* 328 U. S. 33 (1946); *Craig* v. *Harney,* 331 U. S. 367 (1947); *Wood* v. *Georgia,* 370 U. S. 375 (1962), whether those statements are made by a non-party or party to the proceeding, *Wood* v. *Georgia, supra.* Before contempt convictions based on such statements can be upheld, it must be shown that they constitute a "clear and present danger" to the orderly administration of justice, *Bridge* v. *California; Pennekamp* v. *Florida; Craig* v. *Harney; Wood* v. *Georgia,* all *supra.* That test, as applied in such cases, is an exceedingly stringent one.

There was no finding of clear and present danger made in this case; indeed, the order by its own terms finds only "that there is a *reasonable likelihood* that prejudicial news prior to trial would render more difficult the impaneling of a fair and impartial jury and would *tend* to prevent a fair trial." (Emphasis added.) This test bears striking similarity to the "reasonable tendency" test which the state supreme court applied in the *Bridges* case. This Court held in that case that the clear and present danger test applied and that "neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression", 314 U. S. at 273. Therefore, because the order purports not merely to restrain or license speech, but absolutely to prohibit it, upon a showing less than that of clear and present danger, it is void on its face and cannot stand. *Lovell* v. *City of Griffin,* 303 U. S. 444 (1938); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Thomas* v. *Collins,* 323 U. S. 516 (1945); *Niemotko* v. *Maryland,* 340 U. S. 268 (1951); *Staub* v. *City of Baxley,* 355 U. S. 313 (1958).

Both the Court of Appeals and the trial court sought to justify the order and its application in this case on the basis of a supposed right of the public to a fair trial (App., A9-10, A12, A18). It is clear that the interest thus relied upon by the lower courts to justify restriction of Petitioners' right of free speech is the public interest in preserving the integrity of the judicial processes and in preventing interference with the orderly and impartial administration of justice. This, however, is the identical interest which the lower courts in *Bridges* and the cases following it claimed to be protecting. That argument was rejected by this Court in those cases, and the Court stated in the most unequivocal terms that where the threat to the judicial process is conceived as emanating from mere speech, the speech complained of must constitute a clear and present danger to be punishable.

While it is true that, unlike the present case, in *Bridges* and the cases which have followed it, no previous order prohibiting the speeches and publications was there involved, it can hardly be supposed that this alters the standard to be applied. For if a court cannot punish speech not constituting a clear and present danger to the judicial process, it cannot accomplish the same result indirectly by entering an order purporting to prohibit the speech it is powerless to punish and then punishing violation of the order. As the Supreme Court said in *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945): "[I]t is the character of the right, not of the limitation, which determines what standard governs the choice." In that case the defendant deliberately violated an outstanding restraining order. There was no suggestion that the disobedience of the invalid order required punishment notwithstanding the infringement of constitutional rights. See also, *United Gas, Coke & Chemical Workers* v. *Wisconsin Employment Relations Board,* 340 U. S. 383 (1951); *Re Green,* 369 U. S. 689 (1962).

It should be noted in this connection that this is not a case like *Walker* v. *Birmingham,* 388 U. S. 307 (1967), where the Court held that persons who had picketed in violation of a state court injunction were validly convicted of contempt despite a constitutional attack on the injunction. That was a case involving "speech plus"—conduct other than speech which the Court has long held may be validly subjected to regulation: picketing in the public streets. Here it is speech and speech alone which was prohibited. Nor may Petitioners be faulted for failing to first seek orderly review since it is, at the least, highly doubtful whether the order involved in this case is a final, appealable order. Nor were Petitioners obliged to object to entry of the order since it is well settled that where a regulation is void on its face as violative of the first amendment a defendant need not challenge that regulation until faced with a charge that he has violated it, *Smith* v. *Cahoon,* 283 U. S. 553 (1931); *Lovell* v. *City of Griffin,* 303 U. S. 444 (1938); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Thomas* v. *Collins,* 323 U. S. 516 (1945); *Staub* v. *City of Baxley,* 355 U. S. 313 (1958).

The Courts below relied upon *Sheppard* v. *Maxwell, supra,* as authority for the order involved in this case. Petitioners believe that reliance erroneous. The situation in *Sheppard* which moved this Court to void the trial and suggest limitations on speech was totally unlike the situation here. There, newspapers bombarded the populace with highly slanted versions of the facts, the press sat within the bar, the coroner's inquest was televised from the high school gymnasium, and a total "carnival atmosphere" prevailed. Contrasted to this are the remarks of Tijerina and Noll. Tijerina's remarks, translated from Spanish by an interpreter of dubious skill and reported "in substance" by a non-Spanish-speaking newspaperman were related to the pending case in only the most oblique fash-

ion. Noll's ramblings about his kingdom, at most colorful, can hardly be compared to the Cleveland newspaper's crucifixion of *Sheppard.*

The Court, in *Sheppard,* was concerned with preserving the defendant's right to a fair trial, and had no occasion to consider the first amendment questions involved in an order prohibiting a defendant from making public statements about his case. Although the Court did say that such an order might be applied to "any party" (384 U. S. at 361), it did not say what circumstances would justify a "gag" order. The only effect which the Court expressly acknowledged to be a possible consequence of the publicity attributable to Sheppard himself was not that it might result in a denial of his right to a fair trial, but the precise opposite, namely, that such publicity might preclude him from asserting that right (384 U. S. at 359 n. 13). See *People* v. *Massie,* 66 Cal. 2d 899, 428 P. 2d 869 (1967). Thus, it is clear that a defendant, by his conduct may waive his right to a trial insulated from prejudicial publicity, just as it has long been recognized that a defendant may waive a jury trial, an attorney, or his right to stand silent. If, by indulging in public, extra-judicial pronouncements which might engender prejudicial publicity, a defendant chooses to forego assertion of the right to fair trial, that is his choice and not the trial court's.

Even if, under a narrowly drawn order, the Court is entitled to restrict extra-judicial statements by a defendant on a showing less than that of clear and present danger, the present order, *as applied,* is not such an order. As applied, it apparently proscribes any speech whatever about the pending case. Petitioners stated that their trial was set for a certain day and that a gag-rule order had been entered—both matters of public record. There were some intemperate remarks about the judge. Under the *Bridges* rule those remarks were clearly beyond the power

of the court to punish and the order did not proscribe remarks about the judge in any event. Petitioner Tijerina was found to have said that, if the judge asked him, he would say he told witnesses what to say and what to do; he did not name any witnesses, detail their testimony or say that he had in fact told any witness what to testify. Petitioner Noll indulged in some tall talk respecting a threat to declare war on the United States. By implication, the Petitioners conveyed the impression that they thought themselves innocent. In the final analysis, Petitioners were found to have violated the order because they mentioned the date for which trial was set, used the word "witness", accused the judge of "drinking blood", and suggested that they were innocent. It is therefore clear that the order as applied proscribed any remarks which made any reference whatever to the pending criminal proceeding. It is equally clear that there are at least *some* statements about a case which a trial court cannot proscribe. It has never been suggested, for example, that the court could prohibit public reporting of events which transpire in the courtroom or matters which are public record. Unless the defendant, whose life and liberty are at stake, has fewer rights than a member of the general public, he must be able to state, at a minimum, "my trial has been set for November 6th," "I have entered a plea of not guilty to the charges against me", "I have filed motions for change of venue and for the judge assigned to my case to disqualify himself." Indeed, he must have the right to state such matters with a certain amount of vehemence, for he is not engaged in an academic exercise, aimed at resolving an obscure point of law. He is fighting for his liberty, security, property, and, perhaps, his life.

In the present state of the law, the perimeters of the trial court's power to control out-of-court statements of a defendant in a criminal proceeding are undefined; the applica-

bility of *Sheppard* to defendants is unclear. Resolution of these questions involves substantial first amendment issues upon which this Court has not spoken and which call for a delicate adjustment between the defendant's right to a fair trial and his freedom of speech, as well as the necessity of maintaining the integrity of the judicial processes.

CONCLUSION.

For the foregoing reasons, this case is an appropriate one for consideration by this Court, and it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX A.

UNITED STATES COURT OF APPEALS,

Tenth Circuit.

May Term, 1969.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
REIES LOPEZ TIJERINA and
JERRY NOLL,
Defendants-Appellants.

Nos. 3-68 and 4-68

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO.

(District Court No. 23,184 Cr.)

(Filed June 23, 1969. William L. Whittaker, Clerk)

John Quinn, United States Attorney (John A. Babington, Assistant United States Attorney, was with him on the brief) for plaintiff-appellee.

Irving M. King (Morton Stavis, William Kunstler, Albert Gonzales and Beverly Axelrod were with him on the brief) for defendants-appellants.

Before LEWIS, BREITENSTEIN and HICKEY, *Circuit Judges.*

BREITENSTEIN, *Circuit Judge.*

After a trial to the court without a jury, Tijerina and Noll were convicted of criminal contempt and each was sentenced to serve thirty days in jail and to pay a fine of $500. We held the case in abeyance to await the decision of the United States Supreme Court in *Frank* v. *United States*, ... U. S. ....., on the right of an accused in a contempt proceedings to a jury trial. The Frank decision, announced May 19, 1969, held that, if the "actual penalty is one which may be imposed upon those convicted of otherwise petty offenses," a jury trial is not required. Here the penalties were within the prescribed limit. See 18 U. S. C. § 1(3).

These proceedings are an outgrowth of the prosecution of Tijerina, Noll, and three others in the United States District Court for the District of New Mexico for federal offenses. See our decision in *United States* v. *Tijerina*, 10 Cir., 407 F. 2d 349. In the disposition of that case "[t]he court and the parties were concerned with pretrial publicity and the impanelling of an impartial jury." Ibid. at 354. On October 17, 1967, a hearing was held with counsel present for all parties. The problem of pretrial publicity was discussed. Previously defense counsel had suggested that the court should make an order restricting extrajudicial statements. The court stated its intent to make such an order. Counsel for Tijerina then directed attention to a convention of the Federation of Free City States which would be held in a few days. Later the court furnished counsel with copies of the order which it proposed. It made no exception of the convention. No counsel made any objection and the order was entered. It covered the attorneys, the defendants, and the witnesses and forbade them to "make or issue any public statement, written or oral, either at a public meeting or occasion or for public

reporting or dissemination in any fashion regarding the jury or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses or rulings of the Court.'"[1] The order was by Judge Bratton who later presided over the criminal trial.

On October 21 and 22, 1967, the annual convention of Alianza Federal de los Pueblos Libres[2] was held in Albuquerque. Both Tijerina and Noll made speeches at the

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1. The full text of the order follows:

"This matter coming on for consideration by the Court upon its own Motion, and it appearing to the Court that there is a reasonable likelihood that prejudicial news prior to trial would render more difficult the impaneling of a fair and impartial jury and would tend to prevent a fair trial and that the Court should enter an order seeking to prevent difficulties in these regards: Now, Therefore,

IT IS BY THE COURT ORDERED:

1. This Order is binding on all attorneys, both for the Government and the defense, on each of the defendants, and on each witness for both sides. It shall remain in force during the pendency of this action in this court.

2. No party covered by this Order shall make or issue any public statement, written or oral, either at a public meeting or occasion or for public reporting or dissemination in any fashion regarding the jury or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses or rulings of the Court. This Order does not apply to statements made, evidence given, or pleadings filed in this action. Of course, all proceedings in the action are and will continue to be public and matters of public record.

3. No person covered by this Order shall avoid the effect of it by actions which indirectly, but deliberately bring about a violation of this Order.

A copy of this Order shall be served on each party named above immediately upon its entry, and, as each witness is subpoenaed, a copy of this Order shall be served on him with the service of a subpoena."

2. The Alianza Federal de Mercedes mentioned in our opinion in the criminal case, 407 F. 2d 351, had been dissolved and the new organization created.

convention. On the basis of statements then made, the United States Attorney filed an application for an order requiring Tijerina and Noll to show cause why they should not be adjudged in contempt. See Rule 42(b), F. R. Crim. P., and 18 U. S. C. § 401(3). The application was made after the criminal case had gone to the jury. Judge Bratton issued an order to show cause before Judge Ewing T. Kerr, a United States District Judge for the District of Wyoming, who thereafter presided over the contempt proceedings. After a full evidentiary hearing, Judge Kerr made findings of fact and conclusions of law and held both Tijerina and Noll in contempt.

Tijerina and Noll attack the findings of the trial court that the statements with which they are charged were made at a public meeting. They insist that the convention was private and was attended only by members of Alianza and their invited guests. Estimates of the number present varied from 200 to 600. The only claimed restriction on those entering was identification by guards at the doors and payment of the required fee. Two police officers in plain clothes paid the $3.00 charge and entered. Two newspaper reporters and a radio newscaster entered upon identifying themselves. The auditorium was set up with a TV camera and a loudspeaker system. The finding that the meeting was public has substantial support in the record and is not clearly erroneous.

The meeting was held in the Civic Auditorium of Albuquerque. At the request of local police officers and without the knowledge of those in charge of the convention or of either Tijerina or Noll, auditorium personnel installed a tape recorder to record the proceedings. The machine failed to work on the first day but did on the second. The statement charged to Noll and one of the statements charged to Tijerina were preserved on the tape. The

argument is that the recording was an unreasonable search and seizure in violation of the Fourth Amendment. We are not persuaded. Reliance on the electronic surveillance cases is misplaced. Unauthorized electronic eavesdropping upon private conversations is a search and seizure which violates the Fourth Amendment. See *Katz* v. *United States,* 389 U. S. 347, and *Desist* v. *United States,* ..... U. S. .....; *cf. Lopez* v. *United States,* 373 U. S. 427. We are concerned here with statements made at a public meeting to which reporters were admitted. Our attention is directed to no decision holding that the use of mechanical recordings of public proceedings violates the Fourth Amendment. The tapes are a means of corroborating the recollections of those present. We see no constitutional distinction between the receipt of testimony of those present and the admission of the tapes which recorded what was said.

Appellant Tijerina objects to the receipt of testimony by a newspaper reporter, Beier, of statements made by Tijerina on the first day of the convention when the tape recorder was not functioning. Tijerina spoke in Spanish. Beier does not speak or understand Spanish. Martinez, a police officer who spoke Spanish, sat next to Beier and translated certain portions of the speech for Beier who made notes of the gist of what the officer told him. After the speech, Beier read his notes to a Spanish-speaking reporter, Herrera, who confirmed the notes as containing the statements which he, Herrera, heard Tijerina make. Herrera so testified at the trial. On the same day as the speech, Beier discussed in English with Tijerina his remarks regarding Judge Bratton. Beier did not show Tijerina the notes but questioned him about "his mentioning Judge Bratton and Judge Bratton's order." Tijerina made no denial and said that "it wasn't for discussion for the press."

The argument now made is that the hearsay objection to Beier's testimony should have been sustained. In our opinion the testimony was not inadmissible hearsay. We have held that "testimony is not hearsay when it is to prove only that a statement was made and not the truth of the statement." *Creaghe* v. *Iowa Home Mutual Casualty Company,* 10 Cir., 323 F. 2d 981, 984. See also *Aikins* v. *United States,* 10 Cir., 282 F. 2d 53, 57, and *Standard Oil Company* v. *Standard Oil Company,* 10 Cir., 252 F. 2d 65, 75. The testimony of Beier was offered to prove what Tijerina had said and the only question of credibility related to the credibility of Beier. We are concerned with the fact, not the truth, of the statement. Beier was thoroughly cross-examined by defense counsel. The court chose to believe him. The argument that officer Martinez spoke idiomatic New Mexican Spanish while Tijerina used "pure" Spanish is unpersuasive. Tijerina was speaking in Spanish to a large assembly of Spanish-speaking New Mexicans. The fact that Beier got his information through an interpreter goes only to the weight of the evidence. We believe that Beier's testimony was properly received.

The next argument is that the statements charged do not violate the order as a matter of law. The trial court specifically found three statements violative of the order. One made by Tijerina on the opening day of the Alianza convention was:

> "U. S. District Judge Howard C. Bratton last week issued an order against any of the defendants, witnesses and lawyers not to talk about the case outside of the courtroom. If Judge Bratton asks me I'll tell him I told the witnesses what to say and what to do. I may get arrested. This is fine. It's all right with me because I don't want Judge Bratton to judge this case."

The statement of Tijerina on the following day was:

> "For example, the trial of Reies is coming up and Reies Tijerina is going to be judged the 6th of November and that is an important issue. We know that the Judge has taken the power in his own hands. We know that the Judge is using the law to take vengeance and drink blood and humiliate our race. In this case we can advise the Negro pueblo of what is going on and they can come out and march around the court house. This is their business."

The statement of Noll is much longer. After referring to the events at the Echo Ampitheater and asserting that the United States had declared that he and his codefendants "are criminals and that it was going to try us and put us to death," he said:

> "War with the U. S. is imminent, for during the last week of August, I caused to be sent to the self-styled President of the United States of America, an ultimatum which he received August 31st. This ultimatum, in essence, declared that if and when the alleged cases in the U. S. imposed force relative to the events at Echo Ampitheater and Tierra Amarilla should commence for trial, a state of war should exist as of that date between the Kingdom of the Indies and the United States of America. According to the newspaper, the tentative date for the war to commence is November 6th, but I think they are going to try to postpone it. Therefore, prepare yourselves for war. I suggest that a scorched earth policy be used; for every nation that used this policy were victorious. We must burn every tree, every blade of grass, every building within the kingdom. Let them burn, burn, burn."[3]

The record in the criminal trial[4] shows a continuing and

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3. The reference to the events at Echo Ampitheater relates to the activities which caused the then pending federal charges. The reference to Tierra Amarilla is to an unrelated state case.

4. In the contempt proceedings the trial court said that it would take judicial notice of the file in the criminal case.

pervading concern of both court and counsel over the effect which publicity might have on a fair trial of that case. This appears in motions of the defendants for change of place of trial and for continuances and from various colloquies between court and counsel. The hazard arose to some extent from published and broadcast reports of the Echo Ampitheater incidents which were the basis of the then pending federal charges, but more importantly from publicity relating to events at Tierra Amarilla which caused state charges to be made against some of the defendants, and from a variety of public statements made by a number of individuals.

The trial court found that the statements of Tijerina and Noll were wilful and deliberate; and that the statements "created a danger to the rights of these defendants and their co-defendants and the Government to a fair and impartial trial by jury * * *."

In colorful and demagogic language Tijerina and Noll addressed their followers on the merits of the case. Tijerina boasted that he "told the witnesses what to say and what to do." He charged that the judge "is using the law to take vengeance and drink blood and humiliate our race." Noll said that the United States has declared that he and his co-defendants "are criminals and that it was going to try us and put us to death." Tijerina urged a "march around the court house" and Noll suggested "a scorched earth policy." In the context in which they were made such public utterances while a criminal trial was pending are not compatible with the concept of a fair trial. We are aware of the recent admonition that appellate courts "must constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, ... U. S. ..... The findings of the trial court are not clearly erroneous. On the entire evidence we are not "left with the definite and firm

conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395. We are convinced that if the order was valid, Tijerina and Noll violated it.

The defendants argue that the order forbidding extrajudicial statements violates their rights under the First, Fifth, and Sixth Amendments. At the outset it must be noted that in colloquies between the court and counsel an order against extrajudicial statements was discussed. Mention was made of the forthcoming Alianza Convention. The court disclosed to counsel the order which it intended to enter and which did not except the convention. No objection was made to the order entered and no effort was made to get it modified or reviewed. When a court has jurisdiction of the subject matter and person, its orders must be obeyed until reversed for error by orderly review. See *Dunn* v. *United States*, 10 Cir., 388 F. 2d 511, 513, and cases cited in footnote 2. This should dispose of the matter, but the circumstances of the case are such that the constitutional claims merit discussion.

The prime argument of the defendants is that the order infringes on the defendants' rights of free speech guaranteed by the First Amendment. Many volumes have been written on the subject of fair trial and free speech. The problem here is unusual in that the defendants are complaining against the application of such an order to them. The theory of the defense seems to be that because the order was entered for their protection, they cannot be charged with a violation. We do not agree. The public has an overriding interest that justice be done in a controversy between the government and individuals and has the right to demand and expect "fair trials designed to end in just judgments." *Wade* v. *Hunter*, 336 U. S. 684, 689; and *Mares* v. *United States*, 10 Cir., 383 F. 2d 805, 808 and 809. This objective may be thwarted unless an order against

extrajudicial statements applies to all parties to a controversy. The concept of a fair trial applies both to the prosecution and the defense.

The defendants say that the order violates the First Amendment because it fails to meet the clear and present danger test. See *Bridges* v. *California,* 314 U. S. 252, 263, 271; *Pennekamp* v. *Florida,* 328 U. S. 331, 347-348; *Craig* v. *Harney,* 331 U. S. 367, 376; and *Wood* v. *Georgia,* 370 U. S. 375, 383-385. None of the foregoing decisions considered a situation where the contempt arose from the violation of an order. They were all concerned with extrajudicial statements which, in the absence of a prohibitive order, were said to obstruct the administration of justice and have an adverse effect on the right to a fair trial. Here we have the violation of a court order.

Counsel attack the order on the ground that it is not based on a clear and present danger. The order is based on a "reasonable likelihood" of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial. We believe that reasonable likelihood suffices. The Supreme Court has never said that a clear and present danger to the right of a fair trial must exist before a trial court can forbid extrajudicial statements about the trial.

The responsibility of a trial judge to exercise the control necessary to assure a fair trial is emphasized by the decision in *Sheppard* v. *Maxwell,* 384 U. S. 333. The Court said that control of the sources of prejudicial news items is "concededly within the court's power" and that the court "might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters." Id. at 361.

The Court said further, Id. at 363:

> "The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function."

Defense counsel argue that the quoted statements from Sheppard are dicta and have no binding force. We are not persuaded. The Court did not make gratuitous remarks which were not relevant to the issue for decision. In our opinion it established guidelines necessary to assure a fair trial in a case which attracted wide publicity. The failure of the trial court in *Sheppard* to apply and use the procedures, which the Supreme Court said were appropriate, resulted in a reversal.

The ultimate question is whether the application to the defendants of an order against extrajudicial statements violates their rights of freedom of speech. The defense argument necessarily places freedom of speech in a preferred position above fair trial. Some decisions of the Supreme Court place First Amendment rights in a preferred position. See e.g. *Thomas* v. *Collins,* 323 U. S. 516, 530, and discussion of the subject in concurring opinion of Justice Frankfurter in *Kovacs* v. *Cooper,* 336 U. S. 77, 95-96. This preferred position has never been approved in a case where a balance must be had between free speech and fair trial. Indeed, the Court has awarded the preference to fair trial. In *Estes* v. *Texas,* 381 U. S. 532, 540-541, the Court said:

> "We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs. Our approach has been through rules, contempt

proceedings and reversal of convictions obtained under unfair conditions. Here the remedy is clear and certain of application and it is our duty to continue to enforce the principles that from time immemorial have proven efficacious and necessary to a fair trial."

The order against extrajudicial statements was designed to maintain the atmosphere essential to the preservation of a fair trial, "the most fundamental of all freedoms." Both the defendants and the public have the right to expect that justice will be done. The defendants have the protection of the order and the responsibility to obey it. Their rights under the First Amendment were not infringed.

The Fifth Amendment argument is that the order is so broad and vague that it denies due process. We are not so persuaded. The order specifies the persons who are affected, the time when it is in effect, and the conduct which is forbidden. If greater particularity were needed, the defendants could have sought a clarification. They did not do so.

The Sixth Amendment argument is even less convincing. The guarantee of a public trial means a public trial in the courthouse, not in a convention hall.

AFFIRMED.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the District of New Mexico.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
REIES LOPEZ TIJERINA and
JERRY NOLL,
Defendants.

No. 23184 Criminal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Filed at Albuquerque Apr. 17, 1968. E. E. Greeson, Clerk.)

The above-entitled matter having come on regularly for hearing before the Court without a jury, John Quinn, United States Attorney for the District of New Mexico, and Jack L. Love, Assistant United States Attorney for the District of New Mexico, appearing for and on behalf of the United States of America, plaintiff, and Charles Driscoll, Lorenzo E. Tapia and Beverly Axelrod appearing for and on behalf of the defendants, Reies Lopez Tijerina and Jerry Noll, the Court heard and examined the evidence adduced for and on behalf of the parties, and heard the arguments of counsel; and being fully advised in the premises, the Court now makes its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT.

1. On October 21 and October 22, 1967, there was pending in this court a certain criminal case, to-wit: *United States of America* v. *Reies Lopez Tijerina, Jerry Noll, et al.*, #23112 on the criminal docket; that said case had been set for trial; that in said case a certain order had been entered, it having appeared to the Court that "there is a reasonable likelihood that prejudicial news prior to trial would render more difficult the impaneling of a fair and impartial jury and would tend to prevent a fair trial, and that the Court should enter an order seeking to prevent difficulties in these regards * * *."; that the defendants named hereinabove were two of the defendants named in the aforesaid Criminal Action No. 23112.

2. Said order made and entered by the Court provided as follows:

(1) This Order is binding on all attorneys, both for the Government and the defense, on each of the defendants, and on each witness for both sides. It shall remain in force during the pendency of this action in this court.

(2) No party covered by this Order shall make or issue any public statement, written or oral, either at a public meeting or occasion or for public reporting or dissemination in any fashion regarding the jury or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses or rulings of the Court. This Order does not apply to statements made, evidence given, or pleadings filed in this action. Of course, all proceedings in the action are and will continue to be public and matters of public record.

(3) No person covered by this Order shall avoid the effect of it by actions which indirectly, but deliberately bring about a violation of this Order.

Said order provided further that a copy thereof be served on each party named above immediately upon its entry, and, that as each witness is subpoenaed, a copy of said Order be served on him with the service of a subpoena.

3. On October 21, 1967, at the Civic Auditorium in Albuquerque, New Mexico, at a meeting to which the public and the press had been admitted, the defendant Reies Lopez Tijerina made a statement with reference to the aforesaid pending Criminal Case No. 23112; said statement was made by the defendant Reies Lopez Tijerina, in Spanish; that at said time and place and in the open where the audience and members of the press could hear, the defendant made the following statement in substance:

> "U. S. District Judge Howard C. Bratton last week issued an order against any of the defendants, witnesses and lawyers not to talk about the case outside of the courtroom. If Judge Bratton asks me I'll tell him I told the witnesses what to say and what to do. I may get arrested. This is fine. It's all right with me because I don't want Judge Bratton to judge this case."

4. On October 22, 1967, at the Civic Auditorium in Albuquerque, New Mexico, at a meeting to which the public and the press had been admitted, the defendant Reies Lopez Tijerina made a statement with reference to the aforesaid pending Criminal Case No. 23112; said statement was made by the defendant Reies Lopez Tijerina in Spanish; that at said time and place and in the open where the audience and members of the press could hear, the defendant made the following statement in substance:

> "For example, the trial of Reies is coming up and Reies Tijerina is going to be judged the 6th of November and that is an important issue. We know that the Judge has taken the power in his own hands. We know that the Judge is using the law to take vengeance and drink blood and humiliate our race. In this case

we can advise the Negro pueblo of what is going on and they can come out and march around the court house. This is their business."

5. On October 22, 1967, at the Civic Auditorium in Albuquerque, New Mexico, at a meeting to which the public and the press had been admitted, the defendant Jerry Noll made a statement with reference to the aforesaid pending Criminal Case No. 23112; that at said time and place and in the open where the audience and members of the press could hear, the defendant made the following statement in substance:

"The U. S. is for sabotage and revolutionary terror and is practiced by its agents upon us, upon the black people and upon other people. The United States call us revolutionaries when in fact, it is its agents that are the reactionary revolutionists sponsoring and advocating my overthrow by force and violence and other illegal means. Nothing is more evident about the intention of the U. S. than its recent conduct in regard to the events at the Echo Ampitheater [sic], at Tierra Amarilla. Without even any kind of justification, without making any use of diplomatic relations, the U. S. sent police forces into my territorial jurisdiction to exercise an administrative act without my consent. The U. S. has declared with its usual arrogance that comes from the possession of stolen property, that I, Reies Lopez Tijerina, Christobal Tijerina, Esequiel Dominguez, Alfonso Chavez * * * are criminals and that it was going to try us and put us to death. I am willing to die for my country and for my people. That is part of my job as a king and all in a day's work. It's one of the job hazards and if my enemies manage to put me to death, I know that I will not die in vain for the moment which will lead to eventual liberation of my country and the unshackling of the chains for foreign bondage of my people, will be carried forward by my people and who are now beginning to shake off their slumber and know

that they are despised and maltreated by their anglo friends and neighbors.

* * * * *

War with the U. S. is imminent, for during the last week of August, I caused to be sent to the self-styled President of the United States of America, an ultimatum which he received August 31st. This ultimatum, in essence, declared that if and when the alleged cases in the U. S. imposed force relative to the events at Echo Ampitheater and Tierra Amarilla should commence for trial, a state of war should exist as of that date between the Kingdom of the Indies and the United States of America. According to the newspaper, the tentative date for the war to commence is November 6th, but I think they are going to try to postpone it. Therefore, prepare yourselves for war. I suggest that a scorched earth policy be used; for every nation that used this policy were victorious. We must burn every tree, every blade of grass, every building within the kingdom. Let them burn, burn, burn."

6. Said Auditorium had been rented from the City of Albuquerque for the use by, and for the annual convention of the Federal Alliance of Free City-States, also known as the Alianza.

7. The meetings of October 21 and 22, 1967, were public meetings; attendance was not limited to holders of membership cards or invitations or other forms of admission cards or tickets; some people were charged attendance fees; other people were admitted by officers of the Alianza as officially approved guests of the convention.

8. The law enforcement officers did not surreptitiously nor stealthily nor forcibly enter the Auditorium; they did not conceal their presence.

9. Defendants made their speeches from the speakers' platform in the Auditorium and in so doing they knowingly

exposed their remarks to the public and to all persons attending the meetings.

10. The law enforcement officers and persons who recorded portions thereof, observed and heard only that which occurred openly in the Auditorium, and that which was freely apparent to the observation of all those present.

11. Whatever device was used to record defendants' speeches, was used not to listen in on private, confidential conversations, or on remarks or statements that could not otherwise have been heard. It was used only to obtain the most reliable evidence possible of defendants' remarks and to make an accurate record of such remarks.

12. The law enforcement officers and their recording device heard and recorded only those statements which defendants expected to be heard and which defendants knowingly made in the presence of the audience as a whole.

13. At said convention, both of the defendants made oral public statements regarding the merits of the case, the evidence, actual or anticipated, the rulings of the Court, and such remarks, made at that time and under the circumstances, created a danger to the rights of these defendants and their co-defendants and the Government to a fair and impartial trial by jury in the aforesaid pending criminal case.

14. Both of the defendants, Reies Lopez Tijerina and Jerry Noll, violated the aforesaid Order of the Court, and such violation by both defendants was wilful and deliberate, with knowledge of the Order and its contents, and with knowledge that their remarks were a violation of such Order.

Conclusions of Law.

1. The presence of the law enforcement officers was not a trespassory intrusion into the privacy of the defendants and the use of the recording device was permissible.

2. The Order of the Court, referred to in Finding of Fact No. 2, was valid and lawful in all respects, and was not a violation of the freedom of speech provision of the First Amendment to the United States Constitution.

3. The fact that defendants did not know that any members of the audience would repeat their statements by a recording device or otherwise, does not entitle them to the protection of the Fourth Amendment.

4. Both of the defendants knowingly, deliberately and wilfully violated the Order of the Court referred to in Finding of Fact No. 2.

5. The aforesaid conduct of the defendants, under the circumstances, constituted criminal contempt of court, and both of the defendants are guilty thereof.

Dated this 16th day of April, 1968.

Ewing T. Kerr,
Judge.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 456

REIES LOPEZ TIJERINA AND JERRY NOLL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A) and of the district court (Pet. App. B) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1969. On July 11, 1969 the time for filing a petition for a writ of certiorari was extended to August 11, 1969, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a pre-trial order entered by the district court at petitioners' behest and without objection is valid, where the order prohibited any attorney, witness or defendant in the pending criminal case from making any "public statements" regarding the "jury or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses or rulings of the Court."

2. Whether petitioners were properly found wilfully to have violated the order so as to be guilty of contempt.

STATEMENT

The facts are not in dispute and are set forth in the opinion below (Pet. App. A, 2-3). As there found, the present contempt proceeding is an outgrowth of petitioners' prosecution (with three others) in the United States District Court for the District of New Mexico for various federal offenses, principally assaulting officers of the United States Forest Service in the performance of their official duty. See *United States* v. *Tijerina*, 407 F. 2d 349 (C.A. 10), petitions for writs of certiorari pending, Nos. 219, 434 Misc. and 436 Misc. this Term. The parties were concerned with pre-trial publicity and the empanelling of an impartial jury in that case. (See 407 F. 2d, at 354 & n. 15; see also Pet. App. A, 7-8). On October 17, 1967, a pre-trial hearing to discuss the problem of pre-trial publicity was held; counsel for all parties were present. Defense counsel had suggested that the court make an order restricting extra-

judicial statements and the court stated its intent to make such an order. Counsel for Tijerina then directed the court's attention to a convention of the Federation of Free City States[1] which was to be held in a few days. Later, the court furnished counsel with copies of the proposed order, which made no exception for this convention. No counsel made any objection. An order was then entered prohibiting the attorneys, the witnesses, and the defendants from making any "public statement, written or oral, either at a public meeting or occasion or for public reporting or dissemination in any fashion regarding the jury or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses or rulings of the Court." See Pet. App. A, 3 n. 1.

The Federation of Free City States convention was held in Albuquerque on October 21 and 22, 1967. It was open to the public on payment of an admission fee, and newspaper reporters and plainclothes police attended. Both petitioners spoke to the gathering, which apparently numbered between two hundred and six hundred persons. Their statements, two of which were tape-recorded, appear in full in the opinion below (Pet. App. A, 6-7). On the basis of these statements, the United States Attorney filed an application for, and the trial judge issued, an order to show cause before another district judge why petitioners should not be held in contempt. See F.R.

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[1] Petitioner Tijerina was the president of this organization, a group of Spanish Americans who claimed property rights in large areas of New Mexico pursuant to the 1848 Treaty of Guadalupe Hidalgo between the United States and Mexico.

Crim. P. 42(b); 18 U.S.C. 401(3). After an evidentiary hearing, the district judge made findings of fact and conclusions of law in which he determined that both petitioners had "knowingly, deliberately, and wilfully violated" the trial judge's order prohibiting public statements about the case and that they were guilty of criminal contempt. See Pet. App. B, 14-19. Petitioners were sentenced to serve thirty days in jail and to pay fines of $500. The court of appeals affirmed (Pet. App. A).

ARGUMENT

In urging that the present petition for certiorari should be denied, we rely in the main on the thorough opinion of the court below. We add, however, the following observations.

1. Petitioners' principal contention is that the trial judge's order forbidding them from making any public utterances about the merits of their pending criminal case was invalid because it did not purport to rest on a finding that such statements would present a "clear and present danger" that an impartial jury could not be empanelled or a fair trial could not be had, but rather rested on a finding that there was a "reasonable likelihood" (see Pet. App. A, 3 n. 1) that prejudicial news prior to trial would produce this effect. Petitioners argue that the clear and present danger standard is mandated by this Court's decisions in *Bridges* v. *California*, 314 U.S. 252; *Pennekamp* v. *Florida*, 328 U.S. 331; *Craig v. Harney*, 331 U.S. 367; and *Wood* v. *Georgia*, 370 U.S. 375. In those cases, however, there was no judicial order

which was in effect prohibiting the making of public utterances about a pending criminal case. The standard fashioned in those cases—*i.e.*, that the remarks must have created a clear and present danger to the fair administration of justice—limits the circumstances in which a court which has *not* entered a protective order, designed to curtail potentially prejudicial publicity, nevertheless seeks to punish by criminal contempt a person, whether party or outsider, for his public statements about the case. Where the possibility of prejudicial publicity has not been found to require such an order, protection of the speaker requires a stringent standard to be applied in a contempt proceeding; its sole purpose is an after-the-event vindication of the power of the court to insure a fair trial. In that situation, there must be some assurance that the speaker must have known that his remarks threatened to destroy the fairness of the pending criminal trial.

The situation is different, however, where prior warning has been given. In more recent cases, this Court has recognized that the most desirable and effective way to deal with the increasingly prevalent problem of prejudicial publicity is by remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frus-

trate its function." *Sheppard* v. *Maxwell*, 384 U.S. 333, 363. In *Sheppard*, a state case which was reversed because of massive prejudicial news occurring while the trial was in progress, the Court was highly critical of the failure of the trial judge to take effective measures to prevent the inflammatory publicity. It observed (384 U.S., at 361):

> More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as * * * the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. See *State* v. *Van Duyne*, 43 N.J. 369, 389, 204 A. 2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements.

While the Court in *Sheppard* did not have occasion to discuss the degree of danger to the administration of justice sufficient to support such an order, it clearly was not thinking in terms of a "clear and present danger" test. Such a test would allow the imposition of restrictions on public statements concerning a pending case only after a highly charged and inflammatory atmosphere (presumably the result of *prior* prejudicial publicity) had already developed. We believe the court of appeals was correct in its conclusion (Pet. App. 11) that in balancing the rights of public expression and fair trial, the former has never been preferred. The demands of the latter

require that judges be empowered (and indeed encouraged) to enter orders prohibiting potentially damaging types of public statements by parties or outsiders about a pending case whenever, in their judgment, such statements offer a "reasonable likelihood" of preventing a fair trial. A prohibition on public utterances about the case, operative only for the duration of the pre-trial period or trial, and subject to reexamination if circumstances change,[2] is a modest price to exact for insuring the fairness of trial proceedings. We therefore submit that, as the court of appeals held (Pet. App. A, 10), the trial judge in this case applied the proper standard in promulgating his order.

2. Petitioners also urge that they could not be punished for wilfully violating the court's order because only the accused have the right to a fair trial, and they were therefore guilty at most only of choosing to injure themselves (or, as they phrase it, to "forego assertion of the right to fair trial", Pet. 11) by their statements. The argument is clearly without merit. They could hardly choose to waive their co-defendants' rights to fair trial. And, as the court below held (Pet. App. A, 9-10), the public, represented by the government, has an equal interest in seeing that justice be done in a criminal case. See *Wade* v. *Hunter*, 336 U.S. 684, 689; *Mares* v. *United States*, 383 F. 2d 805, 808-809 (C.A. 10); cf. *Singer* v. *United States*, 380 U.S. 24. This Court recognized

[2] In the federal courts, such an order might be immediately appealable to a court of appeals as a "final decision" under 28 U.S.C. 1291. See *Stack* v. *Boyle*, 342 U.S. 1.

in *Sheppard* v. *Maxwell*, 384 U.S. 333, 361 (quoted *infra*, p. 6) that an order prohibiting public statements may be entered with respect to the accused in a criminal case, as well as any attorney, witness, law enforcement officer, or court official.

Finally, petitioners contend (Pet. 11-12) that their public statements at the convention did not constitute a violation of the court's order. This question is one necessarily limited to the particular facts of the present case. And, on those facts, there was a sufficient basis for the trial court to conclude that the remarks made, however general, were a deliberate flouting of the court's order, punishable under it for their tendency to prevent a fair trial. It hardly lies with petitioners, after having recommended through counsel that such an order be adopted and having failed to object to the order as proposed, to protest that the order was drawn too broadly or too vaguely.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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